94-123

RECEIVED
AUG 17 1990
Federal Communications Commission
Office of the Secretary

WILKES, ARTIS, HEDRICK & LANE
CHARTERED
ATTORNEYS AT LAW
1666 K STREET, N. W.
SUITE 1100
WASHINGTON, D. C. 20006-2866
(202) 457-7800

CABLE ADDRESS: WILAN
TELECOPIER: 202-457-7814

JOHN D. LANE
(202) 457-7885

8 BETHESDA METRO CENTER
BETHESDA, MARYLAND 20814-5329
11350 RANDOM HILLS ROAD
SUITE 600
FAIRFAX, VIRGINIA 22030-6042

August 17, 1990

DOCKET FILE COPY ORIGINAL

RECEIVED
AUG 17 1990
Federal Communications Commission
Office of the Secretary

The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
Room 814, 1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition for Declaratory Ruling Regarding Constitutionality of Prime Time Access Rule filed by First Media Corporation

Dear Chairman Sikes:

By letter to you dated July 31, 1990, counsel for First Media Corporation pointed out that his client was entitled to Commission action on his Petition for Declaratory Ruling filed on April 18, 1990. Counsel requested "that you clarify whether the Commission intends to act . . . and if so, when you anticipate such action would occur."

Today, the undersigned together with counsel for other Broadcast parties have filed the enclosed "Opposition to Petition for Declaratory Ruling." As set forth therein, the constitutionality of the Prime Time Access Rule has been twice upheld by the United States Court of Appeals for the Second Circuit in affirming the adoption of PTAR. As further demonstrated in the enclosure, the Commission has no power to overturn these constitutional determinations.

Despite First Media's failure to raise any serious question as to the constitutionality of PTAR, we recognize that the Commission has a responsibility to act on the Petition. It should do so through dismissal of the Petition based on the prior constitutional analysis of the Court of Appeals which remains valid today, as shown by the Supreme

Court's recent affirmance of the Commission's minority ownership policies in Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053.

Respectfully,

John D. Lane
Counsel for Westinghouse
Broadcasting Company, Inc.

Enclosure

cc: Eugene F. Mullin, Esq.
Nathaniel F. Emmons, Esq.

94-123

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

RECEIVED

AUG 17 1990

Federal Communications Commission
Office of the Secretary

IN THE MATTER OF:

Petition for Declaratory Ruling concerning Constitutionality of Section 73.658(k) of the Commission's Rules (Prime Time Access Rule).	)))))

To: The Commission

OPPOSITION TO PETITION FOR DECLARATORY RULING

Media General Broadcasting Group, Outlet Communications, Inc., Pulitzer Broadcasting Co., Tribune Broadcasting Company and Westinghouse Broadcasting Company, Inc., ("Respondents"), by their attorneys, oppose the Petition filed on April 18, 1990, by First Media Corporation ("First Media") for a Declaratory Ruling that the Prime Time Access Rule ("PTAR"), 47 C.F.R. §73.658(k), contravenes the First Amendment of the Constitution of the United States.

Respondents are licensees of network affiliated or independent broadcast stations and are thus directly affected by PTAR. The rule is a prudent and valid exercise of the Commission's regulatory powers which does not infringe on the right of any party in our free society to exercise its right of free speech under the First Amendment. As the Court has twice stated in upholding the Commission's adoption of PTAR in the face of similar constitutional challenges, it is ". . . a

reasonable step toward fulfillment of . . . [the First Amendment's] fundamental precepts." Mt. Mansfield Television, Inc v. FCC, 442 F.2d 470, 477 (2d Cir. 1971); See also NAITPD v. FCC, 516 F.2d 526, 531-532 (2d Cir. 1975). There has been no change since these rulings which should cause any court to revisit these determinations. The Supreme Court recently relied on the same basic premise of allocational scarcity to sustain the Commission's minority ownership policies in its landmark decision in Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053 (June 27, 1990).

Particularly in light of Metro Broadcasting, no "controversy" or "uncertainty" requiring resolution through a declaratory ruling exists. Furthermore, under the Communications Act, the Commission is not empowered to issue constitutional rulings. First Media's Petition is subject to dismissal for these reasons alone. In doing so, the Commission should make crystal clear that the arguments raised by First Media misperceive the Commission's 1987 Syracuse Peace Council Decision 1/ and fail to raise any other substantial question as to the continued constitutional vitality of PTAR.

1/ Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), aff'd sub nom., Syracuse Peace Council v. FCC, 867 F.2d, 654 (D.C. Cir. 1989), cert. denied, 107 L.Ed.2d 737 (1990) (hereinafter "Syracuse").

I. AS NO CONTROVERSY OR UNCERTAINTY AS TO THE CONSTITUTIONALITY OF PTAR EXISTS, THE COMMISSION HAS NO BASIS TO ISSUE A DECLARATORY RULING

Initially, it is important to distinguish what First Media is -- and is not -- seeking. It has not requested the Commission to institute rulemaking proceedings to reject or modify PTAR based upon public interest considerations. Nor has it sought a determination that a particular action of the Commission applying the rule to it is improper or unconstitutional. Rather, it has only sought an advisory declaratory ruling as to the constitutionality of a general rule on which the Court of Appeals for the Second Circuit has twice ruled. 2/

Under Section 1.2 of the Commission's rules and Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), a declaratory ruling may be issued only to "terminate a controversy" or "remove uncertainty". First Media's petition presents neither factor. There is no controversy or uncertainty over the constitutionality of PTAR. Rather, as set forth more fully below, it has been decisively confirmed by the Courts. Simply stating that a controversy exists or there is uncertainty as to a point does not alone give rise to a justiciable issue -- particularly on a constitutional question. Nor does a request to revisit a rule. An "agency is not required to reconsider the merits of the rule each time

---

2/ A request for a declaratory ruling in the absence of a controversy is a request for an advisory opinion. See Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1380 (D.C. Cir. 1979).

it seeks to apply it." Meredith Corp. v. FCC, 809 F.2d 863, 872-74 (D.C. Cir. 1987), cert. denied, 107 L.Ed.2d 737 (1990).

The Commission has no independent power to interpret the Constitution or issue advisory constitutional interpretations. Since the days of Marbury v. Madison, 5 U.S.(1 Cranch) 137 (1803), the power to interpret the Constitution has rested exclusively in the judiciary under Article III of the Constitution and even Article III Courts will not render advisory constitutional rulings. Baker v. Carr, 369 U.S. 1986 (1962). When no "controversy" exists, the Commission has no role to play. The Court of Appeals in Syracuse, supra, made clear the impropriety of the Commission rendering purely advisory constitutional rulings. See 867 F.2d at 658-59.

II. THE COURT'S PRIOR DETERMINATIONS OF CONSTITUTIONALITY REMAIN VALID TODAY

First Media is not the first party to challenge the constitutionality of PTAR. In both Mt. Mansfield and NAITPD, supra, the Court of Appeals for the Second Circuit considered the same claim and twice found PTAR furthered, rather than abridged, fundamental First Amendment freedoms. Two related but independent reasons compel the Commission to respect these judicial determinations of constitutionality. First, as a purely constitutional question is involved, these judicial determinations are controlling and may not be reviewed or

reversed by the Commission. Second, and more important, the determination is constitutionally correct.

First Media asks for the impossible when it requests a constitutional declaration from the FCC. As the constitutionality of PTAR has already been upheld on First Amendment grounds in Mt. Mansfield and NAITPD, supra, no "controversy" or "uncertainty" as to this issue exists. Accordingly, the Commission has no authority under Section 5(d) of the APA to review these Article III determinations which are, in effect, the "law of the case" unless or until modified by an Article III court with appropriate jurisdiction over the subject matter. The Commission is bound by these determinations (to which it was a party) and may not make a unilateral constitutional declaration of its own to the contrary.

More importantly, the constitutional analysis of the Court in Mt. Mansfield is above reproach. The FCC's fundamental power to regulate in the public interest is premised on technological factors which "make it impossible for all who wish to be broadcasters to do so. . ." Mt. Mansfield, supra, 442 F.2d at 477. As there are more entities wishing to become broadcasters than there are frequencies to license, the First Amendment confers no absolute right on any party to the unabridged use of a scarce resource. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 391 (1969). See also National Broadcasting Co. v. FCC, 319 U.S. 190 (1943).

In the context of this fundamental condition of allocational spectrum scarcity, it is that "the right of the viewers and listeners, not the right of the broadcasters which is paramount." Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 389 (1969). In the interest of diversity of service, the Supreme Court for almost 50 years since the landmark NBC case has consistently recognized that a somewhat different First Amendment standard must be applied to the broadcast media than to other types of communication.

In accord with these fundamental principles, the United States Court of Appeals upheld PTAR against First Amendment challenges by the networks in 1971 and again by the major Hollywood studios in 1975: ". . . the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the '[d]iversity of programs and development of diverse and antagonistic sources of program service'." Mt. Mansfield, 442 F.2d at 477. In so holding, the Second Circuit in Mt. Mansfield and NAITPD premised its rationale solidly on Red Lion and NBC.

NBC, Red Lion and Mt. Mansfield are still the law of the land; subsequent cases (including Syracuse Peace Council) and the passage of time have not undermined the allocational spectrum scarcity principle relied upon therein. To the contrary, this fundamental precept was relied on only this year by the Supreme Court to affirm the Commission's power to

foster minority ownership of broadcast facilities. In Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053 (June 27, 1990), the Court upheld the Commission's minority ownership and distress sale policies against constitutional challenge. As summarized by the Court:

> Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.
>
> We have long recognized that "[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licenses in favor of others whose views should be expressed on this unique medium." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic officer," National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943); rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. United States, 326 U.S. 1, 20 (1945). Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. 3/

In challenging the constitutionality of PTAR solely on the basis that a scarcity no longer exists, First Media would question the Commission's fundamental power to regulate. Not only PTAR, but virtually all broadcast

---

3/ Metro Broadcasting, Inc. v. F.C.C., supra at 5058.

regulations, including as shown in Metro all minority ownership policies, would become suspect.

NBC, Red Lion, Mt. Mansfield and Metro Broadcasting share the common premise that allocational spectrum scarcity justifies the special First Amendment treatment of broadcasting. As recognized by the Commission in Syracuse, this is a different concept from the concept of numerical media scarcity relied upon by the Commission and subsequently the Court on appeal. This was made very clear by the Commission in Syracuse -- "technological advancements and the transformation of the telecommunications market described above [and repeated in the First Media petition] have not eliminated spectrum scarcity." Syracuse, 2 FCC Rcd at 5055. Even the Commission does not possess the power by administrative fiat to change the basic laws of physics and grant the spectrum requests of all applicants.

As stated in Syracuse, the Commission considers spectrum scarcity in making allocational and licensing decisions. Such decisions do not violate the First Amendment rights of the losing parties or those selected as licensees. The Commission, because of allocational spectrum scarcity, may and does require the sharing of an allocation among more than one licensee. See Maricopa County Community College District, MM Docket No. 88-442, released July 11, 1990. 4/

4/ See also FCC V. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (limiting multi-media combinations in single markets). These types of limitations can be compared to reasonable time, place and manner

(continued...)

The source restrictions of PTAR are really no different under the First Amendment.

The growth in the number and types of media outlets charted in depth by the Commission in Syracuse and cited in the First Media petition, simply does not provide any basis for the constitutional challenge raised by First Media. Giving full credit to the Commission's extensive media analysis in Syracuse, the growth of cable and other new technologies does not change the reality of a scarce broadcast spectrum. There are still far more applicants for broadcast licenses than there are frequencies to award. Why else would First Media, for example, pay approximately $200,000,000 for the right to operate a VHF television station in Orlando 5/ whose physical assets are probably valued at no more than one-twentieth of that amount.

This difference between allocational scarcity and a growth in the number of media outlets (so-called numerical scarcity) is aptly pointed out by the Commission's stance in Syracuse -- a stance which was soundly rejected by the courts. In Syracuse, the Commission sought to substitute the concept of numerical scarcity for allocational spectrum scarcity and premise its decision to eliminate the Fairness Doctrine on both constitutional and public interest grounds.

4/(...continued)
restrictions on expression which are indifferent to content and voice no First Amendment concerns.

5/ See Application to assign license of WCPX-TV, Orlando, FL, filed June 29, 1986.

This effort was in explicit response to an earlier suggestion of the Supreme Court in a footnote in FCC v. League of Women Voters of California, 468 U.S. 364, 376, n.11 (1984), that a Commission or Congressional determination of no scarcity might prompt the Court to change its Red Lion analysis. The Court of Appeals rejected the Commission's attempt, upholding the Commission's action strictly on the basis of the Commission's discretion under the public interest standard to change its policies based on a numerical scarcity analysis alone. See Syracuse Peace Council v. FCC, 867 F.2d at 656-659. Thus the Court never reached or discussed the concept of allocational scarcity.

The Supreme Court elected not to review the Court of Appeals' opinion in Syracuse, thus declining to accept the Commission's invitation to reconsider Red Lion. Moreover, subsequent to its denial of certiorari in Syracuse, the Supreme Court in Metro, explicitly relied on the concept of allocational spectrum scarcity set forth in NBC, Red Lion and Mt. Mansfield as the basis of its decision. See page 7, supra. The sole issue raised by First Media has now been decisively resolved against it.

Finally, the Commission itself has indicated that its Syracuse Fairness Doctrine decision was not intended to question regulations designed to promote diversity. As noted by the Supreme Court in Metro, ". . . the Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its

'regulations designed to promote diversity.'" Metro, 58 U.S.L.W. at 5064, n.41, quoting Syracuse Peace Council (Reconsideration), 3 F.C.C. Rcd 2035, 2041, n. 56 (1988). PTAR is certainly one of those regulations.

III. PTAR IS A CONTENT NEUTRAL RULE WHICH DOES NOT INFRINGE ON FIRST AMENDMENT FREEDOMS

In restricting affiliate acceptance of network programming to three of the four hours of evening prime time, the Commission sought simply to foster the "development of diverse and antagonistic sources of program service . . . essential to the broadcast licensee's discharge of his duty as trustee for the public in the operation of his channel." Network Television Broadcasting, 23 FCC 2d 382, 400 (1970). As characterized by the Court of Appeals in upholding the adoption of PTAR:

> . . . as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects - the general public. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests". 6/

PTAR is a modest content-neutral measure; it only limits network affiliated stations in the top fifty television markets to the carriage of network or off-network programming in three of the four hours of prime time. This is a restriction only on the source of a program. "The Commission does not dictate to the networks or the licensees, or the

---

6/ Mt. Mansfield, supra, 442 F.2d at 478, citing Associated Press v. U.S., 326 U.S. 1, 20 (1945).

independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast." Mt. Mansfield, 442 F.2d at 480 (emphasis in original). The rule does not dictate or discriminate against a program on the basis of the message being conveyed, the substance of the discussion or other content-related factors.

Indeed, the only factor which could even be argued to be content-related is the exemption of certain broad types of network program matter (e.g., on the spot coverage of a bona fide news event, public affairs, documentary programs, and programs designed for children) from the operation of the rule. The relaxation of PTAR requirements for such broad categories of program matter does not impose any content restriction on stations. Rather, this provides stations with more flexibility and freedom in the selection of particular programs. As the Court of Appeals held in affirming the Commission's adoption of these exemptions:

> The Commission by this amendment of the rule is not ordering any program or even any type of program to be broadcast in access time. It has simply lifted a restriction on network programs if the licensee chooses to avail himself of such network programs in specified categories of programming. 7/

First Media argues that PTAR precludes it from broadcasting certain off-network programs during the hour from 7:00 to 8:00 p.m., which it would broadcast in the absence of

---

7/ NAITPD v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).

the rule. This is simply incorrect. Under PTAR, First Media is free to broadcast any particular program at any time of the day. It could, for example, broadcast the currently popular off-network program, Cosby, during that period by merely adjusting its schedule elsewhere so that no more than three hours of network and off-network programming was broadcast in the aggregate in the four-hour prime time period covered by the rule. Such flexibility enhances the basic content-neutral nature of the rule and provides stations with ample freedom to schedule particular programs (regardless of their source) at the time deemed most suited to the needs of their audiences.

In the twenty years since its adoption, PTAR has been successful in encouraging a diversity of sources of programming. First-run syndication has become a booming business, with approximately 250 programs currently available.[8/] Both network affiliated and independent television broadcasters have more choices than ever before in deciding what to program to serve the needs of their audiences. We know of no Commission regulation which has better served the fundamental First Amendment rights of the public to receive broadcast service from the broadest possible spectrum of sources.

8/ See Variety, January 10, 1990.

IV. NO OTHER CASE CITED BY FIRST MEDIA CASTS DOUBT ON THE CONSTITUTIONALITY OF PTAR

Other recent First Amendment cases cited in the First Media petition do not substantiate its call for a change in the manner in which the Commission regulates broadcasting, nor do they show PTAR to be unconstitutional. While conceding that there are traditional differences in First Amendment interpretation between broadcast and cable operations due to the scarcity of broadcast frequencies, First Media urges that the same standard now be applied. Given the continuing reality of allocational spectrum scarcity (a different issue from outlet choice), no basis for such a change exists.

There is no judicial precedent for equating cable with broadcast for First Amendment purposes, and cable cases in this area can easily be distinguished from the situation at hand. "Cable television and ordinary commercial broadcast television operate on the basis of wholly different technical and entrepreneurial principles." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), citing generally Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). Without the scarcity underpinnings of broadcast technology, cable regulation has traditionally been held to a more rigorous First Amendment standard: "the 'scarcity rationale' has no place in evaluating government regulation of cable television." Quincy Cable, 768 F.2d at 1449.

In ruling local channel "must-carry" rules unconstitutional under the First Amendment, the Quincy court

found that their impact could carry them outside the realm of only an incidental burden on speech, especially when mandatory signals substantially or completely occupied a cable system's capacity and prevented other programmers from reaching their intended audience. Id. at 1453. PTAR, however, has the opposite effect: in restricting one hour per day of an affiliate's schedule to non-network-generated programming, the Rule carries out its specified purpose of allowing other program sources to reach the American public.

First Media would also have the Commission rely upon Home Box Office, Inc. v. FCC, 567 F.2d 9, (D.C. Cir. 1977) ("HBO"). This case, too, is easily distinguishable; the court in HBO itself found "important differences between cable and broadcast television". Id. at 43. Even "[t]he absence in cable television of the physical restraints of the electromagnetic spectrum does not, however, automatically lead to the conclusion that no regulation of cable television is valid." Id. at 46. Indeed, even in the cable area, the court suggested that regulations which provide order among conflicting speakers can be consistent with the First Amendment; that "[r]estriction becomes abridgment only when government seeks to limit speech 'because it is on one side of the issue rather than another'." Id. at 47, quoting A. Meiklejohn, Political Freedom 27 (1960).

As the petition concedes, PTAR does not favor any particular viewpoint on any issue. First Media nevertheless contends that the Rule is unconstitutional because it imposes

a time restriction that turns on content, citing Regan v. Time, Inc., 468 U.S. 641 (1984). This argument is based on an incorrect perception of the concept of content which was the subject of Regan. "The First Amendment's basic guarantee is of freedom to advocate ideas." Kingsley International Pictures Corp. v. Regents of University of New York State, 360 U.S. 684, 688 (1959). Regulations held to be content-based have consistently been those in which a governmental entity sought to control the presentation of controversial issues. See, e.g., Consolidated Edison v. Public Service Commission, 447 U.S. 530 (1980) (order prohibiting public utility inserts regarding controversial issues within consumer bills struck down); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (statute prohibiting corporations from advertising on controversial issues not related to their business struck down). Content-neutral regulations, on the other hand, are those which do not attempt to stifle one side of an issue in favor of another, but which incidentally may work to restrict an activity (argued to involve the exercise of First Amendment rights) in order to regulate for another, reasonable purpose. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (National Park Service regulations against sleeping in Washington parks upheld over objections of homeless demonstrators); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (ordinance prohibiting political campaign sign posting on public property upheld).

Regan requires that time, place, and manner regulations 1) may not be based upon either the content or subject matter of speech, 2) must serve a significant governmental interest, and 3) must leave open ample alternative channels for communication of the information. Regan, 468 U.S. at 648. PTAR satisfies all portions of this requirement.

PTAR restrictions are not based on the content of programs. A very significant government interest lies behind the Rule in promoting source diversity over a limited broadcast spectrum. Far from hampering the First Amendment, PTAR is meant to assure the First Amendment rights of non-network programmers and the public in gaining access to the spectrum. This is precisely the type of government interest recently upheld in Metro.

The Rule leaves ample alternative time for those it restricts to reach their audience. The networks have 23 of the 24 hours of the broadcast day to program which they now do not fully utilize. Moreover, they may offer any program at any time.

V. EVEN IF SUBJECT TO A MORE RIGOROUS NON-BROADCAST FIRST AMENDMENT ANALYSIS, PTAR IS CONSTITUTIONAL UNDER THE U.S. V. O'BRIEN BALANCING TEST

For those media and other forms of expression not subject to special regulation due to their scarcity, a more rigorous First Amendment standard has traditionally been applied. Before a government regulation restricting speech or

expression can be justified, it must be within the constitutional power of the Government, further an important or substantial governmental interest, that interest must be unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of the interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).

Even if PTAR were to be judged under this higher standard applied to cable, print and other forms of communication, it is still constitutional. As the Court of Appeals has held, " the Commission was acting well within its statutory powers in adopting the prime time access rule." Mt. Mansfield, 442 F.2d at 480. The rule furthers the substantial government interest of promoting broadcast diversity, Id. at 478, an interest the Supreme Court of the United States still finds vitally important twenty years after PTAR's promulgation. See Metro, 58 U.S.L.W. at 5058. Promoting diversity in expression is the opposite of regulating to suppress it, assuring that PTAR satisfies the third prong of the O'Brien standard. Finally, the impact on broadcasters is incidental. PTAR's modest restrictions are no greater than necessary to further the important and legitimate government interest of promoting diversity.

CONCLUSION

For these reasons, it is obvious that First Media's petition must be dismissed. The Commission has no power to entertain requests for advisory constitutional opinions.

Indeed, even Article III Courts which have the power to interpret the Constitution do not issue such rulings in the abstract.

Moreover, the Supreme Court's continued reliance on allocational spectrum scarcity as the basis for regulation in Metro confirms beyond question the Court of Appeals' prior constitutional affirmations of PTAR in Mt. Mansfield and NAITPD. Even if it were appropriate for the Commission to entertain the petition on its merits, there would be no basis to conduct a new review of the constitutionality of PTAR. No controversy or uncertainty requiring a declaratory ruling exists.

Respectfully submitted,

MEDIA GENERAL BROADCASTING GROUP

by: Stanley B. Cohen

Stanley B. Cohen, Esquire
Cohn & Marks
1333 New Hampshire Avenue, NW
Suite 600
Washington, DC 20036

Its Attorney

OUTLET COMMUNICATIONS, INC.

by: Gerald Scher

Gerald Scher, Esquire
McGovern, Noel & Falk
2445 M Street, NW
Suite 260
Washington, DC 20037

Its Attorney

PULITZER BROADCASTING CO.

by: Erwin G. Krasnow
Erwin G. Krasnow, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand, Chartered
901 - 15th Street, NW
Washington, DC 20005

Its Attorney

TRIBUNE BROADCASTING COMPANY

by: Robert A. Beizer
Robert A. Beizer, Esquire
Sidley & Austin
1455 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20004

Its Attorney

WESTINGHOUSE BROADCASTING
COMPANY, INC.

by: John D. Lane
John D. Lane, Esquire
Ramsey L. Woodworth, Esquire
Wilkes, Artis, Hedrick & Lane
Chartered
1666 K Street, NW
Suite 1100
Washington, DC 20006

Its Attorneys

August 17, 1990

CERTIFICATE OF SERVICE

I, Jane Nauman, hereby certify that copies of the foregoing "Opposition to Petition for Declaratory Ruling" were served on this 17th day of August, 1990, by first-class mail, postage prepaid, to the following individuals at the addresses listed below:

Eugene F. Mullin, Esq.
Nathaniel F. Emmons, Esq.
Mullin, Rhyne, Emmons & Topel
1000 Connecticut Avenue, NW
Suite 500
Washington, DC 20036

Henry Geller
Suite 300
1776 K Street, NW
Washington, DC 20006

Jane Nauman
Jane Nauman